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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DONALD FAISON,	:	08 CV 2192 (PKC)(DFE)
Plaintiff,	:	
- against -	:	
LEONARD ST., LLC,	:	
Defendant.	:	

DEFENDANT'S MEMORANDUM OF LAW
IN SUPPORT OF ITS MOTION TO DISMISS
PLAINTIFF'S AMENDED COMPLAINT

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PRELIMINARY STATEMENT

Defendant Leonard St., LLC ("Leonard St." or "Defendant"), by and through its attorneys, Fugazy & Rooney LLP, submits this memorandum of law in support of its motion for an order, pursuant to Fed. R. Civ. P. 12(b)(6), to dismiss Plaintiff's Amended Complaint in its entirety for failure to state a claim.

Although Plaintiff Donald Faison ("Plaintiff") has filed an Amended Complaint consisting of approximately two-hundred twenty-three (223) pages, this matter is relatively simple. Plaintiff asked for a particular weekend off and, Plaintiff alleges, due to staffing concerns, his request was denied. A few days later, Plaintiff came to work thirty (30) minutes late, did not like how he was treated by his supervisor and quit. The fact that the reason for Plaintiff's time-off request was to attend a religious assembly does not, in itself, provide Plaintiff with a cause of action. There are no allegations in the Amended Complaint, nor any facts in the transcripts attached thereto, that give rise to an inference of religious discrimination. The facts, as plead, simply do not state a claim to relief that is plausible on the face of the Amended Complaint or the incorporated documents.

FACTS

I. THE COURT SHOULD PROPERLY CONSIDER FACTS STATED ON THE FACE OF THE COMPLAINT AND IN DOCUMENTS APPENDED TO THE COMPLAINT AND INCORPORATED IN THE COMPLAINT BY REFERENCE

In determining the adequacy of a claim under Fed. R. Civ. P. 12(b)(6), facts stated on the face of the complaint, in documents appended to the complaint and in documents incorporated in the complaint by reference should be considered. *Allen v. Westpoint-Pepperell, Inc.*, 945 F.2d 40, 44 (2d Cir. 1991) (stating that, "In determining the adequacy of a claim under Rule 12 (b)(6), consideration is limited to facts stated on the face of the complaint, in documents appended to the complaint or incorporated in the complaint by reference, and to matters of which judicial notice may be taken.") Plaintiff's Amended Complaint consists of approximately two-hundred twenty-three (223) pages, composed of eighteen (18) narrative misnumbered pages, annexed to miscellaneous case documents consisting of approximately sixteen (16) pages, and unemployment hearing transcripts consisting of approximately one-hundred, eighty-nine (189) pages.[1] Accordingly, because Plaintiff annexed case documents and transcripts to his Amended Complaint, the Court may properly consider the facts contained in these case documents and the testimony contained in these transcripts as part of this motion. *See*, *Id.*; *see also*, *Automated Salvage Transport, Inc. v. Wheelabrator Environmental Sys., Inc.*, 155 F.3d 59, 67 (2d Cir. 1998) (holding that on a motion to dismiss the district court may consider "facts stated on the face of the complaint and in documents appended to the complaint or incorporated in the complaint by reference").

Additionally, the transcripts Plaintiff annexed to his Amended Complaint contained exhibits, which he did not annex. The exhibits we deem relevant for the purposes of our motion are attached to the Fugazy Affirmation as Exhibit "A." Because Plaintiff's Amended Complaint contains these transcripts which in turn refer to and discuss the exhibits, the Complaint incorporates the transcript exhibits by reference. In *Berg v. Empire Blue Cross and Blue Shield*, 105 F. Supp. 2d 121, 126 (S.D.N.Y. 2000), this court held that in considering whether to dismiss an ERISA claim, it was proper to consider the entire summary and description and not just the portion submitted by plaintiff. *Id*.; *see Sanders v. Bressler*, 2006 U.S. Dist. LEXIS

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1 Because Plaintiff's included the transcript of his Unemployment Hearings, it should be noted that The Department of Labor, the Unemployment Insurance Administrative Law Judge and The Unemployment Insurance Appeal Board all ruled that Plaintiff quit his job without good cause and therefore was ineligible to receive unemployment insurance benefits.

8352, at * 6 (E.D.N.Y. 2006) (applying same rule to permit defendants accused of breach of contract to submit retainer letters to court from which complaint had selectively referred); *Whitney Info Network, Inc. v. Weiss*, 2008 U.S. Dist. LEXIS, at *5 (E.D.N.Y. Mar. 18 2008) (where complaint alleging defamation selectively quoted from an email, defendant permitted to submit entire email in support of motion to dismiss).

II. STATEMENT OF RELEVANT FACTS[2]

Defendant is a restaurant that employed Plaintiff as a Line Cook from December 2005 through August 28, 2006 (1/4/07 R43:21-25-R44:2-3; 1/4/07 R43:21-25-R44:2-4).[3] Plaintiff wanted a weekend off from work to attend a "Circuit Assembly of Jehovah's Witnesses." (Compl. at ¶ 24.)[4] On or about August 27, 2006, Plaintiff's request was allegedly denied because the restaurant was short staffed. (Compl. at ¶ 26). In allegedly denying the request, Plaintiff's boss, Chef Josh Eden, purportedly told Plaintiff that he would have to choose between his work and his religion, and that if he didn't abide by the schedule it would be job abandonment. (Compl. at ¶ 25). On August 28, 2006, Plaintiff came into work thirty minutes late. (Compl. ¶ 2 on page 17).[5] It is undisputed that upon Plaintiff's arrival, Plaintiff's Supervisor, Chef Josh Eden was aggravated and made statements regarding Plaintiff's lateness and request for time off. (1/4/07 R8:25- R9:6; 1/4/07 R45:5-R57:8). According to Plaintiff, Chef

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2 Defendants admit the allegations in the Complaint as true only for the purposes of this Motion.

3 The citation (_/_/__ R_:_) refers herein to one of the three transcripts Complainant annexed to his Amended Complaint and the respective page number and lines therein.

4 The citation (Compl. at ¶ _) refers to the indicated paragraph contained within Plaintiff's "Amended Complaint For Employment Discrimination."

5 This citation refers to the second paragraph on the seventeenth (17th) page of the Amended Complaint. Please note, the pages of Plaintiff's Amended Complaint are misnumbered and at various points, the paragraph numbering ceases.

Eden allegedly "yelled," "screamed" and "harassed" Plaintiff. (Compl. ¶ 2 on page 17). It is also undisputed that in response to Chef Eden's comments, Plaintiff summarily quit and "abandoned" his job. (*Id.*; 1/4/07 R 9:9-10; 57:8).

Defendant had a policy prohibiting harassment in the workplace which contained a complaint procedure for any employee who felt he had been harassed. (The Defendant's "Anti-Harassment Policy" is attached to the Fugazy Affirmation as part of Exhibit "A"). In December 2005, Plaintiff signed an acknowledgement of receipt of this policy. ("Acknowledgement" is attached to the Fugazy Affirmation as Exhibit "A"; 1/4/07 R65:24-R66:7). Nonetheless, there is some dispute as to exactly when Plaintiff became aware of the policy. Regardless, Plaintiff alleges that he became in possession of the policy about seven months after he started work, in June or July of 2006, and therefore, it is undisputed that Plaintiff was in possession of the policy prior to his abandoning his job. (Compl. at ¶¶ 16 and 21; 5/10/07 R14:2-R15:8). It is also undisputed that Plaintiff did not take any steps to complain, either internally or externally, about discrimination or harassment until after he abandoned his job. (5/10/07 R15:9-R19:14). Plaintiff filed his charge of discrimination with the State Division of Human Rights about two weeks after he abandoned his job.[6]

ARGUMENT

I. THE LEGAL STANDARD FOR THIS MOTION TO DISMISS

It is well settled that, when considering a Rule 12(b) motion to dismiss, the Court accepts plaintiff's allegations at face value, or, as true, and construes the allegations in the complaint in the plaintiff's favor. However, "[t]o survive a motion to dismiss, a complaint must

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6 Plaintiff's charge of discrimination is appended to the Amended Complaint.

plead 'enough facts to state a claim to relief that is plausible on its face.'" *Ruotolo v. City of New York*, 514 F.3d 184, 188 (2d Cir. 2008) (quoting *Bell Atl. Corp. v. Twombly,* 127 S.Ct. 1955, 1974, 167 L. Ed. 2d 929 (2007)). Additionally, the Court need only accept well-pled allegations of fact as true. *See, e.g., L'Europeenne de Banque v. La Republica de Venezuela*, 700 F. Supp. 114, 122 (S.D.N.Y. 1988) (explaining that "legal conclusions, deductions or opinions couched as factual allegations are not given a presumption of truthfulness.") And, while the pleading standard is a liberal one, bald assertions and conclusions of law will not suffice." *Leeds v. Meltz*, 85 F.3d 51, 53 (2d Cir. 1996). If, after assuming all facts alleged to be true, a plaintiff still fails to plead the basic elements of the cause of action, the Court may dismiss the claim. *See Franceschi v. Mautner-Glick Corp.*, 22 F.Supp.2d 250 (S.D.N.Y. 1998).

II. PLAINTIFF FAILS TO STATE A HOSTILE WORK ENVIRONMENT OR RETALIATION CLAIM

Plaintiff does not plead enough facts to state a plausible claim to relief for a hostile work environment or for retaliation. *See*, *Ruotolo*, 514 F.3d at 188. To prevail on a hostile environment claim, the Plaintiff must demonstrate "that the workplace was permeated with discriminatory intimidation that was sufficiently severe or pervasive to alter the conditions of [his or] her work environment, and that a specific basis exists for imputing the conduct that created the hostile environment to the employer." *Petrosino v. Bell Atlantic*, 385 F.3d 210, 221 (2d Cir. 2004). Plaintiff has not sufficiently pled hostile work environment harassment because (1) there is no allegation that his supervisor's conduct was motivated by his religion, (2) the conduct complained of does not rise to the level of being severe or pervasive; and (3) there is no basis for imputing the conduct being complained of to the employer.

Additionally, assuming, *arguendo*, Plaintiff is alleging a retaliatory hostile work environment, he has not adequately pled it, because that too would require allegations of more severe or frequent conduct than that which Plaintiff alleged. *See*, *McWhite v. New York Housing Auth.*, 2008 U.S. Dist. LEXIS 29145, at *39 (E.D.N.Y. April 10, 2008).

1. Plaintiff's "Harassment" Was Not Based Upon a Protected Characteristic

"[I]t is axiomatic that mistreatment at work . . . is actionable under Title VII only when it occurs because of an employee's…protected characteristic." *Brown v. Henderson*, 257 F.3d 246, 252 (2d Cir. 2001). There are no facts alleged, either in the Amended Complaint or in the annexed transcript, that give rise to an inference of discrimination. While Plaintiff's request for time off stemmed from his religion, there is no allegation that his Supervisor's "harassment" had any connection whatsoever to Plaintiff's religious beliefs. To the contrary, the only "harassment" complained of in the Amended Complaint occurred on August 28, 2006, after Plaintiff arrived at work thirty (30) minutes late and his boss began "yelling" and "screaming." The transcripts annexed to the Amended Complaint make it clear that while the supervisor's yelling and screaming may have contained complaints about Plaintiff's request for time off, the impetus was Plaintiff's tardiness, not his religion. (1/4/07 R45:5-R57:12; 5/10/07 R5:21-R9:23).

For his claim to survive, Plaintiff must allege that he was treated differently than "similarly situated" persons or he must show disparaging comments or other evidence of discrimination. *Abdu-Brisson v. Delta Air Lines, Inc.*, 239 F.3d 456, 467-468 (2d Cir. 2001). In this case, not only does Plaintiff fail to contrast his treatment to other similarly situated employees, but he testified his supervisor's behavior was not uniquely directed towards him, going as far as to say, "the chef did in fact yell. Um, that's what he did in the restaurant;" (1/4/07 R71:17-18) and "I always observed him screaming at other people..." 1/4/07 R58:25-59:5). There is no reason to believe that these other individuals were of the same religion as Plaintiff. Many bosses are harsh, unjust, and rude, but this is not necessarily discrimination. In evaluating a hostile work environment case, the Court must exclude actions that lack a linkage or correlation to the claimed ground of discrimination. *Alfano v. Costello*, 294 F.3d 365, 377 (2d Cir. 2002). Accordingly, Plaintiff fails to state a prima facie case of a hostile work environment based upon religious discrimination.

2. Plaintiff's Work Environment Was Not Severe or Pervasive Enough To Support a Claim of Harassment or Retaliation

A claim of hostile work environment harassment requires a showing that Plaintiff's workplace was permeated with discriminatory intimidation, ridicule, and insult that was sufficiently severe or pervasive to alter the conditions of the Plaintiff's employment and create an abusive work environment. *Mormol v. Costco Wholesale Co.*, 364 F.3d 54, 58 (2d Cir. 2004). "A work environment is considered hostile if a reasonable person would have found it to be so and if the plaintiff subjectively so perceived it." *McWhite*, 2008 U.S. Dist. LEXIS 29145, at *39 (citing *Mormol,* 364 F.3d at 58). "In determining whether a reasonable person would perceive the environment as hostile, the court looks at the totality of circumstances, including the frequency of the conduct, the severity of the harm, whether the conduct is physically threatening or humiliating or a mere offensive utterance, and whether the conduct unreasonably interferes with the employee's work performance. *McWhite*, at *39-40. In summary, "[t]he test is whether "the harassment is of such a quality or quantity that a reasonable employee would find the conditions of her employment *altered for the worse." Id* at *40 (citing *Whidbee v. Garzarelli Food Specialties, Inc.,* 223 F.3d 62, 70 (2d Cir. 2000)). "[I]ncidents that are relatively minor and infrequent will not meet the standard for a discriminatory hostile work environment." *Deters v. Lafuente,* 368 F.3d 185, 189 (2d Cir. 2004). "As a general rule, incidents must be more than episodic; they must be sufficiently continuous and concerted in order to be deemed pervasive." *McWhite*, 2008 U.S. Dist. LEXIS 29145 at, *41 (citing *Alfano v. Costello,* 294 F.3d 365, 374 (2d Cir. 2002)).

In light of the standards set forth by the Second Circuit, Plaintiff has not plead facts that *plausibly* could lead to the conclusion that he was harassed because of his religion. At best, Plaintiff has plead that on one occasion Chef Josh Eden, in denying Plaintiff's leave request, told Plaintiff he would have to choose his work and his religion, and on one occasion (August 28, 2008) Chef Josh Eden "yell[ed]" and "scream[ed]" at him in connection with their argument of Plaintiff's leave request. Such allegations do not come close to stating a claim for discrimination. *See Augustin v. The Yale Club of New York City*, 2008 U.S. App. LEXIS 8775 (2d Cir. April 23, 2008) (upholding grant of summary judgment to defendant where "the allegedly discriminatory and mostly uncorroborated events were infrequent and sporadic, occurring a few times over [plaintiff's] five-year employment at the Club. The worst of the allegations against the Club involve episodes of name-calling, inappropriate behavior by a supervisor, and other perceived slights, which, however regrettable, do not constitute a hostile work environment even if taken as true"); *Figueroa v. City of New York*, 2004 U.S. App. LEXIS 25258 (2d Cir. 2005) (upholding grant of summary judgment where "[i]n a six year period, [plaintiff] claim[ed] that there were five potentially inappropriate comments, two pranks, a few acts of mistreatment of her property and threats of violence, and at least ten adverse personnel decisions, only a few of which even arguably evidence gender discrimination. While even a single incident can be sufficiently severe to create a hostile work environment, the incidents alleged here do not rise to that level").

Similarly, Plaintiff's allegations cannot plausibly establish that he was subjected to an illegal retaliatory hostile work environment.[7] "[I]in order to establish that a retaliatory hostile work environment is sufficiently severe, a plaintiff must satisfy the same standard applied in hostile work environment claims, namely that the "'incidents of harassment following complaints were sufficiently continuous and concerted to have altered conditions of an employees' employment.'" *McWhite*, 2008 U.S. Dist. LEXIS at *39 (quoting *Thomas v. iStar Fin., Inc.,* 438 F. Supp. 2d 348, 365 (S.D.N.Y. 2006). "Any employer action that 'produces an injury or harm' that is 'materially adverse,' that might have dissuaded a reasonable worker from making or supporting a charge of discrimination, is actionable. Normally, '[p]etty slights, minor annoyances, and simple lack of good manners' will not deter a worker from making a charge of discrimination." *Id.* (quoting *Burlington Northern & Santa Fe Ry. Co. v. White,* 548 U.S. 53, 126 S. Ct. 2405, 2412-13, 165 L. Ed. 2d 345 (2006)). Again, Plaintiff has alleged, at best, one stray remark and a single heated disagreement between himself and his supervisor and about his leave request. This cannot plausibly state a claim for unlawful retaliation. In fact, very recently, this Court granted summary judgment to a defendant on a Title VII retaliation claim and held, "[i]n this case, incidents where [defendant] publicly yelled at Plaintiff for various reasons or called him "sh[-]t" through [a subordinate who relayed the comment] constitute, as a matter of law, the sorts of petty slights and personality conflicts that are not actionable." *Martinez v. New York City Dep't of Educ.*, 2008 U.S. Dist. LEXIS 41454, at *40 (S.D.N.Y. May 27, 2008); *see*

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7 It is unclear if Plaintiff is even alleging he was subjected to a hostile work environment because he complained when he was denied time off. However, considering Plaintiff admits he abandoned his job, has not alleged any other plausible assertion of rights and has alleged he was retaliated against, it is a logical assumption.

McWhite (seven separate alleged incidents of harassment could not establish unlawful retaliation).

3. Under the Facts Alleged, Plaintiff Cannot Prove *Respondeat Superior* Liability

Even if Plaintiff had adequately alleged a *prima facie* case of hostile work environment harassment (which he has not), Plaintiff still cannot hold Defendant liable for the alleged harassment because an employer can avoid liability for a supervisor's harassment of a subordinate if it demonstrates that (a) it exercised reasonable care to prevent and correct promptly any harassing behavior, and (b) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

Plaintiff's Amended Complaint fails under this criterion for several reasons. First, his Amended Complaint is totally devoid of any allegation that Defendant failed to exercise reasonable care to prevent and correct promptly any harassing behavior or that he took advantage of the corrective opportunities provided to him. *See, Quinn v. NYS Office of Temporary and Disability Ins.*, 537 F.Supp.2d 427, 431 (N.D.N.Y. 2008) (indicating this is a necessary pleading requirement); *see also, Blanco v. Brogan, et. al.*, 20007 U.S. Dist. LEXIS 86890, *6 (S.D.N.Y. 2007) (same). Moreover, Plaintiff admits in his Amended Complaint that he in fact had possession of an Employee Handbook (which contained the Defendant's Anti-Harassment Policy and complaint procedure) before the alleged harassment took place. *See*, Compl. at ¶¶ 16 & 21. In his Amended Complaint, Plaintiff does allege that he "protested and complained" to "Grey Gourdet" (Compl. at ¶32), however, when the statement is viewed in context, it is clear that Plaintiff is alleging he complained regarding his being scheduled to work when he wanted off, not about an alleged hostile work environment. Additionally, the transcripts annexed to his Amended Complaint contain lengthy testimony by Plaintiff regarding the fact that Plaintiff possessed a copy of Defendant's anti-harassment policy yet he unreasonably failed to avail himself of any of the avenues of complaint provided by Defendant. (*See*, 5/10/07 R14:2-R19:14).

III. PLAINTIFF FAILS TO STATE A CLAIM FOR DISCRIMINATION BASED UPON DENIAL OF A RELIGIOUS ACCOMMODATION OR A CONSTRUCTIVE DISCHARGE

To make out a *prima facie* case of religious accommodation discrimination, an employee must show that he (a) held a bona fide religious belief conflicting with an employment requirement, (b) informed his employer of this belief, and (c) he suffered some adverse employment action for refusing to comply with the conflicting employment requirement. *Baker v. Home Depot*, 445 F.3d 541, 546 (2d Cir. 2006). Even assuming, *arguendo*, Plaintiff's attendance at the religious assembly qualifies as a "bona fide religious belief" that conflicted with his employment requirement of attendance, Plaintiff never suffered an adverse employment action. Plaintiff admittedly quit after his supervisor "yelled" and "screamed" at him for being late. To the extent that Plaintiff may be claiming his alleged constructive discharge was an adverse employment action, such a claim fails because Plaintiff's allegations do not support a constructive discharge claim. Likewise, to the extent Plaintiff is relying on his boss' alleged statement regarding him choosing between his work and his religion, and that if he didn't abide by the schedule it would be job abandonment, as an adverse employment action, his claim would fail because a mere threat does not, as a matter of law, rise to the level of an adverse employment action in this Circuit.

1. Plaintiff Does Not State A Claim For Constructive Discharge

To make out a claim for constructive discharge Plaintiff must prove, in part, that the conditions complained of were such that a reasonable person in his position would have been compelled to resign. *Pena v. Brattleboro Retreat*, 702 F.2d 322, 325 (2d Cir. 1983). This reasonableness inquiry cannot be satisfied if the employee does not first give the employer an opportunity to remedy the situation. *Brady v. Wal-Mart Stores, Inc.*, 2005 U.S. Dist. LEXIS 12151, at *16-17 (E.D.N.Y. 2005). As discussed above, Plaintiff did not seek redress from Defendant prior to his resignation—he never even bothered to follow the known and well-publicized complaint procedure. Therefore, his claim for constructive discharge must fail as a matter of law.

Moreover, Plaintiff cannot argue that his anticipated denial of a religious accommodation resulted in an actionable constructive discharge because that argument would require Plaintiff allege the Defendant deliberately made Plaintiff's working conditions intolerable with the intent of causing him to resign. *Johnson v. K-Mart Corp.*, 1997 U.S. App. LEXIS 34000 (4th Cir. 1997); *Goldmeier v. Allstate Insurance Company*, 337 F.3d 629 (6th Cir. 2003). In *Johnson v. K-Mart Corp.,* the plaintiff quit because K-Mart's new policy of requiring every employee to work at least one Sunday per month interfered with her religious beliefs. The Fourth Circuit, in affirming a district court's grant of summary judgment to K-Mart, held that in the absence of evidence that K-Mart adopted the work schedule for the *purpose* of causing the plaintiff to resign, the plaintiff could not prove constructive discharge, and accordingly could not establish a *prima facie* case of religious discrimination. *Johnson*, 1997 U.S. App. LEXIS 34000 at *4. Similarly, in *Goldmeier v. Allstate*, Orthodox Jews resigned their positions as insurance agents with Allstate after the company announced plans to require offices to remain open on Friday evenings and Saturday mornings. Because they had not yet suffered discipline or discharge over this conflict, the district court dismissed their complaints for failure to make a prima facie case and the Sixth Circuit affirmed. In so holding, the Sixth Circuit found that the Plaintiff's constructive discharge claim failed, among other reasons, for lack of evidence that Allstate "deliberately created intolerable working conditions . . . with the intention of forcing" the plaintiffs to quit.

In the case at bar, Plaintiff has not pled any facts that could plausibly suggest that Defendant denied his leave request for the purpose of inducing him to abandon his job, and accordingly, he cannot claim that the anticipated denial of his religious accommodation caused his constructive discharge.

2. Plaintiff Did Not Suffer An Adverse Employment Action

Plaintiff's allegation that his boss told him he would have to choose between his work and his religion, and that if he didn't abide by the schedule it would be job abandonment, does not, as a matter of law, rise to the level of an adverse employment action in this Circuit. "In this Circuit, most courts that have faced the issue have decided that an unrealized threat of discipline or termination is not actionable under Title VII." *Bowles v. New York City Transit Authority*, 2006 U.S. Dist. LEXIS 32914 at *34 (S.D.N.Y. 2006), *aff'd* 2008 U.S. App. LEXIS 14656 (2d Cir. 2008), (citing *Massie v. Ikon Office Solutions, Inc.*, 381 F. Supp. 2d 91, 100 (N.D.N.Y. 2005) (where plaintiff had received numerous warnings his "fear of being terminated [was] not an adverse employment action because of its lack of consequence"); *Bennett v. Watson Wyatt & Co.*, 136 F.Supp.2d 236, 248 (S.D.N.Y. 2001) (where a plaintiff was repeatedly warned but never disciplined, "such criticism, without any other negative results such as a decrease in pay or being placed on probation, simply [could] not support plaintiff's discrimination claims");

Stembridge v. City of New York, 88 F. Supp. 2d 276, 283 (S.D.N.Y. 2000) (acknowledging that "an employment decision need not result in discharge to fall within the Title VII protection," but holding that, where a plaintiff failed to show that reprimand had "a cognizable or material impact on the terms or conditions of his employment," he had not established an adverse employment action)).

The facts of *Bowles v. New York City Transit Authority*, 2008 U.S. App. LEXIS 14656, are strikingly similar to the alleged facts in the case at bar. In *Bowles*, Plaintiff could not work Sundays because of religious reasons. When he approached his supervisor to complain that he was scheduled for Sundays, his supervisor told him that he would not be given Sundays off and that if he did not like it, he should seek a job in the private sector. Plaintiff sued, alleging, among other things, that his supervisor's threat of termination was an adverse employment action, satisfying that element of a reasonable accommodation claim. This Court ruled that plaintiff's claim failed because a threat is not an adverse action, and the Second Circuit affirmed. *See, Bowles*, 2006 U.S. Dist. LEXIS 32914 at *34, *aff'd* 2008 U.S. App. LEXIS 14656.

Research has found only three decisions by courts of this Circuit that have explicitly held that an unrealized threat of termination could satisfy the adverse employment action requirement: *Pozo v. J & J Hotel Co.*, 2007 U.S. Dist. LEXIS 34143 (S.D.N.Y. 2007), *Khan v. Fed. Reserve Bank*, 2005 U.S. Dist. LEXIS 1543 (S.D.N.Y. 2005) and *Pruitt v. Metcalf & Eddy, Inc.*, 2006 U.S. Dist. LEXIS 293 (S.D.N.Y. 2006). In *Khan*, Judge Francis held that "the threat of an adverse action is sufficient . . . provided that the plaintiff can prove that the employer is in fact intransigent and that the threatened action is causally related to the conflict between the employer's policy and the plaintiff's religion," *Id.* at *5. Similarly, *Pruitt* quotes *Khan* for the proposition that "the threat of a sanction is enough" to meet the third prong of the standard, but does not actually reach the question of whether the *Pruitt* plaintiff had adequately alleged such a threat. *Pruitt*, 2006 U.S. Dist. LEXIS 293 at *10. *Pozo* followed *Kahn* and held that the threat of discipline was sufficient to satisfy the third prong, "provided that the plaintiff can prove that the employer is in fact intransigent …" *Pozo v. J & J Hotel Co.*, 2007 U.S. Dist. LEXIS 34143 at *25, *citing, Khan*, 2005 U.S. Dist. LEXIS 1543 at *5. Even under this broader standard – and assuming *arguendo* that Plaintiff's boss' comment *was* a threat – Plaintiff's claim still cannot plausibly state a claim because Plaintiff has not alleged (nor can he allege) the required intransigent unwillingness on Defendant's part to work out some solution. Plaintiff has no knowledge regarding Defendant's intransigence or flexibility because he never complained to senior management as he was entitled to do under the policy—instead he quit. *cf. Khan*, 2005 U.S. Dist. LEXIS 1543 at *5.

CONCLUSION

Based upon the foregoing, the Defendants respectfully request the Court to (1) grant their motion to dismiss the Amended Complaint in its entirety pursuant to Fed. R. Civ. P. 12(b)(6) and (2) grant Defendant attorneys fees for the cost of making this motion; and (3) grant further relief as the Court deems proper.

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/S/

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